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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 45

FEDERAL POWER COMMISSION, *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE STATE OF WISCONSIN AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN

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INTEREST OF AMICI CURIAE

The interests of the State of Wisconsin and the Public Service Commission of Wisconsin (hereinafter, the "Amici Curiae" or "Wisconsin") arise from the fact that the State of Wisconsin is one of the states of the United States, and its agency, the Public Service Commission of Wisconsin has jurisdiction (contained in Chapters 193, 196, Wisconsin Statutes) to regulate *inter alia* matters affecting service and rates for natural gas sold and distributed in local distribution in the State of Wisconsin. The Amici Curiae are interested in complete, effective,

and permanent regulation of matters which pertain to the transportation and sale of natural gas to the end that the ultimate consumer will receive reasonably adequate natural gas service at just and reasonable prices. As indicative of their past participation and interest in these matters, the State of Wisconsin and the Public Service Commission of Wisconsin were parties to and submitted brief and oral argument in the Supreme Court in the "Phillips Case." *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, affirming *State of Wisconsin and Public Service Commission of Wisconsin* v. *Federal Power Comm.*, (U.S.App. D.C.) 205 F. 2d 706.

The State of Wisconsin and the Public Service Commission of Wisconsin are concerned that the decision below will adversely affect the protection afforded consumers within Wisconsin by the Natural Gas Act. They believe the decision unduly restricts the certificate authority of the Federal Power Commission and deprives it of authority vested in it under the Natural Gas Act to consider the effect on regulated prices of proposed transportation arrangements when ruling on applications for certificates of public convenience and necessity for such transportation.

ARGUMENT

Wisconsin sees in the decision below a distinct threat to the consumer protection so recently assured the citizens of Wisconsin and the United States in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672 (1954), and *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

The decision below opens up a gap in the regulatory scheme by effectively removing from the Federal Power

Commission control large volumes of gas moving in interstate commerce that otherwise would be subject to effective certificate and rate regulation. The Amici Curiae take no position on the issue whether the use to which the gas involved in this proceeding would be an inferior or superior one. They are concerned, however, that the decision below would permit unregulated direct purchases by large ultimate consumers to compete with jurisdictional purchases by pipe lines serving, among other states, Wisconsin, and would do so without any effective restraint by the Federal Power Commission or any other agency. Purchases by such type of consumer will increase competition in many areas, the supply of which is normally inflexible in nature and under the law of supply and demand unquestionably will drive the price to higher levels.

The State of Wisconsin and its Public Service Commission as the regulatory body charged with responsibility of administering the regulatory scheme of the State of Wisconsin, are acutely conscious of the need for reasonable latitude in construing rather general statutory phrases, such as public convenience and necessity. Accordingly, they view with concern the restrictive interpretation by the court below of the Federal Power Commission's effort effectively to administer the Natural Gas Act. The Power Commission was faced with a proposal that threatened to emasculate the efforts of this Court and the Commission to protect the interests of consumers, by creating a gap in Federal regulation of the gas industry. It attempted to meet this threat with action that was consistent with the spirit of the Cateo case, *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378. Wisconsin

contends that this action on the part of the Commission was squarely within its administrative and statutory responsibility. The Amici Curiae further contend that the court below misconceived the basis for the Commission's action when it characterized what the Commission did as an effort to assert a general allocation and conservation authority over the natural gas fields of the United States.

Historically, no state or state regulatory agency has been more deeply involved than Wisconsin in the continued effort to regulate natural gas prices effectively. Having watched the painful emergence of a relatively cohesive regulatory pattern, the Amici Curiae view with particular alarm a judicial decision that threatens to open a significant gap in the fabric. Wisconsin fears that the effect of this decision will be to circumvent regulation in an important respect. More importantly, however, the Amici Curiae are concerned because if the decision is upheld, the Federal Power Commission would be denied the right to exercise a judicially enforced statutory obligation to consider price, when certificating such portions of an application for certification of public convenience and necessity, over which it does have jurisdiction. Most certainly such an eventuality, fraught with danger to the public interest as it is, should not be permitted to rest on the erroneous concept that an effort effectively to contain price increases is an assertion of an alleged conservation authority.

We ask that the Court recognize and give effect to the same latitude and flexibility in interpreting the broad statutory standard of "public convenience and necessity," as it has in many other analogous cases, such as *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S.

581, 588 (recognizing the Commission's broad discretion in cost allocation in pipeline rate cases); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464; *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470; and *S.E.C.* v. *Chenery*, 332 U.S. 194.

CONCLUSION

In order to preserve a reasonable regulatory scheme, not only at the Federal Power Commission level but in the State regulatory community as well, and to conserve the principles of producer pricing regulation so pain fully won by the consumers and commissions, the authority of the Federal Power Commission to deny certificates seeking authority to transport gas in interstate commerce, when the purchase threatens to disrupt the existing purchasing patterns and increase consumer costs, should be upheld

Respectfully submitted,

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